

Introduced by Senator Jackson

December 22, 2016

An act to amend Section 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 62, as introduced, Jackson. Unlawful employment: family care and medical leave.

Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. The act provides that if the same employer employs both parents entitled to leave under the act, the employer is not required to grant leave in connection with the birth, adoption, or foster care of a child that would allow the parents family care and medical leave totaling more than the amount specified in the act.

The act defines "child" to mean a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age or an adult dependent child. The act defines "family care and medical leave" to mean, among other things, leave for reason of the serious health condition of a child, and leave to care for a parent or a spouse who has a serious health condition. The act defines "parent" to mean a biological, foster, or adoptive parent,

a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

This bill would make various changes to the definitions described above, thereby expanding the persons and purposes for which leave is required to be provided under the act. The bill would redefine the term “child” to include a biological, adopted, or foster son or daughter, a stepchild, a legal ward, a son or daughter of a domestic partner, or a person to whom the employee stands in loco parentis, and would remove the restriction on age or dependent status. The bill would expand the definition of leave with regard to caring for persons with a serious health condition to also include leave to care for a grandparent, grandchild, sibling, or domestic partner who has a serious health condition. The bill would include a parent-in-law in the definition of “parent.” The bill would delete the above-described provision regarding an employer who employs both parents entitled to leave under the act.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 12945.2 of the Government Code is
- 2 amended to read:
- 3 12945.2. (a) Except as provided in subdivision (b), it ~~shall be~~
- 4 ~~is~~ an unlawful employment practice for ~~any employer, as defined~~
- 5 ~~in paragraph (2) of subdivision (c),~~ *an employer* to refuse to grant
- 6 a request by any employee with more than 12 months of service
- 7 with the employer, and who has at least 1,250 hours of service
- 8 with the employer during the previous 12-month period, to take
- 9 up to a total of 12 workweeks in any 12-month period for family
- 10 care and medical leave. Family care and medical leave requested
- 11 pursuant to this subdivision shall not be deemed to have been
- 12 granted unless the employer provides the employee, upon granting
- 13 the leave request, a guarantee of employment in the same or a
- 14 comparable position upon the termination of the leave. The
- 15 commission shall adopt a regulation specifying the elements of a
- 16 reasonable request.
- 17 (b) Notwithstanding subdivision (a), it shall not be an unlawful
- 18 employment practice for an employer to refuse to grant a request
- 19 for family care and medical leave by an employee if the employer

1 employs less than 50 employees within 75 miles of the worksite
2 where that employee is employed.

3 (c) For purposes of this section:

4 (1) “Child” means a biological, adopted, or foster ~~child~~, *son or*
5 *daughter*, a stepchild, a legal ward, ~~or a child of a person standing~~
6 ~~in loco parentis who is either of the following: a son or daughter~~
7 *of a domestic partner, or a person to whom the employee stands*
8 *in loco parentis.*

9 (A) ~~Under 18 years of age.~~

10 (B) ~~An adult dependent child.~~

11 (2) “Employer” means either of the following:

12 (A) Any person who directly employs 50 or more persons to
13 perform services for a wage or salary.

14 (B) The state, and any political or civil subdivision of the state
15 and cities.

16 (3) “Family care and medical leave” means any of the following:

17 (A) Leave for reason of the birth of a child of the ~~employee;~~
18 *employee or* the placement of a child with an employee in
19 connection with the adoption or foster care of the child by the
20 ~~employee, or the serious health condition of a child of the~~
21 ~~employee.~~

22 (B) Leave to care for a ~~parent or a spouse~~ *child, parent,*
23 *grandparent, grandchild, sibling, spouse, or domestic partner* who
24 has a serious health condition.

25 (C) Leave because of an employee’s own serious health
26 condition that makes the employee unable to perform the functions
27 of the position of that employee, except for leave taken for
28 disability on account of pregnancy, childbirth, or related medical
29 conditions.

30 (4) “Employment in the same or a comparable position” means
31 employment in a position that has the same or similar duties and
32 pay that can be performed at the same or similar geographic
33 location as the position held prior to the leave.

34 (5) “FMLA” means the federal Family and Medical Leave Act
35 of 1993 ~~(P.L. 103-3)~~; *(Public law 103-3; 29 U.S.C. Sec. 2601 et*
36 *seq.).*

37 (6) “Health care provider” means any of the following:

38 (A) An individual holding either a physician’s and surgeon’s
39 certificate issued pursuant to Article 4 (commencing with Section
40 2080) of Chapter 5 of Division 2 of the Business and Professions

1 Code, an osteopathic physician's and surgeon's certificate issued
2 pursuant to Article 4.5 (commencing with Section 2099.5) of
3 Chapter 5 of Division 2 of the Business and Professions Code, or
4 an individual duly licensed as a physician, surgeon, or osteopathic
5 physician or surgeon in another state or jurisdiction, who directly
6 treats or supervises the treatment of the serious health condition.

7 (B) Any other person determined by the United States Secretary
8 of Labor to be capable of providing health care services under the
9 FMLA.

10 (7) "Parent" means a biological, foster, or adoptive parent, a
11 *parent-in-law*, a stepparent, a legal guardian, or other person who
12 stood in loco parentis to the employee when the employee was a
13 child.

14 (8) "Serious health condition" means an illness, injury,
15 impairment, or physical or mental condition that involves either
16 of the following:

17 (A) Inpatient care in a hospital, hospice, or residential health
18 care facility.

19 (B) Continuing treatment or continuing supervision by a health
20 care provider.

21 (d) An employer shall not be required to pay an employee for
22 any leave taken pursuant to subdivision (a), except as required by
23 subdivision (e).

24 (e) An employee taking a leave permitted by subdivision (a)
25 may elect, or an employer may require the employee, to substitute,
26 for leave allowed under subdivision (a), any of the employee's
27 accrued vacation leave or other accrued time off during this period
28 or any other paid or unpaid time off negotiated with the employer.
29 If an employee takes a leave because of the employee's own serious
30 health condition, the employee may also elect, or the employer
31 may also require the employee, to substitute accrued sick leave
32 during the period of the leave. However, an employee shall not
33 use sick leave during a period of leave in connection with the birth,
34 adoption, or foster care of a child, or to care for a child, parent, or
35 spouse with a serious health condition, unless mutually agreed to
36 by the employer and the employee.

37 (f) (1) During any period that an eligible employee takes leave
38 pursuant to subdivision (a) or takes leave that qualifies as leave
39 taken under the FMLA, the employer shall maintain and pay for
40 coverage under a "group health plan," as defined in Section

1 5000(b)(1) of the Internal Revenue Code, for the duration of the
2 leave, not to exceed 12 workweeks in a 12-month period,
3 commencing on the date leave taken under the FMLA commences,
4 at the level and under the conditions coverage would have been
5 provided if the employee had continued in employment
6 continuously for the duration of the leave. Nothing in the preceding
7 sentence shall preclude an employer from maintaining and paying
8 for coverage under a “group health plan” beyond 12 workweeks.
9 An employer may recover the premium that the employer paid as
10 required by this subdivision for maintaining coverage for the
11 employee under the group health plan if both of the following
12 conditions occur:

13 (A) The employee fails to return from leave after the period of
14 leave to which the employee is entitled has expired.

15 (B) The employee’s failure to return from leave is for a reason
16 other than the continuation, recurrence, or onset of a serious health
17 condition that entitles the employee to leave under subdivision (a)
18 or other circumstances beyond the control of the employee.

19 (2) (A) Any employee taking leave pursuant to subdivision (a)
20 shall continue to be entitled to participate in employee health plans
21 for any period during which coverage is not provided by the
22 employer under paragraph (1), employee benefit plans, including
23 life insurance or short-term or long-term disability or accident
24 insurance, pension and retirement plans, and supplemental
25 unemployment benefit plans to the same extent and under the same
26 conditions as apply to an unpaid leave taken for any purpose other
27 than those described in subdivision (a). In the absence of these
28 conditions an employee shall continue to be entitled to participate
29 in these plans and, in the case of health and welfare employee
30 benefit plans, including life insurance or short-term or long-term
31 disability or accident insurance, or other similar plans, the employer
32 may, at his or her discretion, require the employee to pay
33 premiums, at the group rate, during the period of leave not covered
34 by any accrued vacation leave, or other accrued time off, or any
35 other paid or unpaid time off negotiated with the employer, as a
36 condition of continued coverage during the leave period. However,
37 the nonpayment of premiums by an employee shall not constitute
38 a break in service, for purposes of longevity, seniority under any
39 collective bargaining agreement, or any employee benefit plan.

40 For

1 (B) For purposes of pension and retirement plans, an employer
2 shall not be required to make plan payments for an employee
3 during the leave period, and the leave period shall not be required
4 to be counted for purposes of time accrued under the plan.
5 However, an employee covered by a pension plan may continue
6 to make contributions in accordance with the terms of the plan
7 during the period of the leave.

8 (g) During a family care and medical leave period, the employee
9 shall retain employee status with the employer, and the leave shall
10 not constitute a break in service, for purposes of longevity, seniority
11 under any collective bargaining agreement, or any employee benefit
12 plan. An employee returning from leave shall return with no less
13 seniority than the employee had when the leave commenced, for
14 purposes of layoff, recall, promotion, job assignment, and
15 seniority-related benefits such as vacation.

16 (h) If the employee's need for a leave pursuant to this section
17 is foreseeable, the employee shall provide the employer with
18 reasonable advance notice of the need for the leave.

19 (i) If the employee's need for leave pursuant to this section is
20 foreseeable due to a planned medical treatment or supervision, the
21 employee shall make a reasonable effort to schedule the treatment
22 or supervision to avoid disruption to the operations of the employer,
23 subject to the approval of the health care provider of the individual
24 requiring the treatment or supervision.

25 (j) (1) An employer may require that an employee's request
26 for leave to care for a child, a spouse, or a parent who has a serious
27 health condition be supported by a certification issued by the health
28 care provider of the individual requiring care. That certification
29 shall be sufficient if it includes all of the following:

30 (A) The date on which the serious health condition commenced.

31 (B) The probable duration of the condition.

32 (C) An estimate of the amount of time that the health care
33 provider believes the employee needs to care for the individual
34 requiring the care.

35 (D) A statement that the serious health condition warrants the
36 participation of a family member to provide care during a period
37 of the treatment or supervision of the individual requiring care.

38 (2) Upon expiration of the time estimated by the health care
39 provider in subparagraph (C) of paragraph (1), the employer may
40 require the employee to obtain recertification, in accordance with

1 the procedure provided in paragraph (1), if additional leave is
2 required.

3 (k) (1) An employer may require that an employee's request
4 for leave because of the employee's own serious health condition
5 be supported by a certification issued by his or her health care
6 provider. That certification shall be sufficient if it includes all of
7 the following:

8 (A) The date on which the serious health condition commenced.

9 (B) The probable duration of the condition.

10 (C) A statement that, due to the serious health condition, the
11 employee is unable to perform the function of his or her position.

12 (2) The employer may require that the employee obtain
13 subsequent recertification regarding the employee's serious health
14 condition on a reasonable basis, in accordance with the procedure
15 provided in paragraph (1), if additional leave is required.

16 (3) (A) In any case in which the employer has reason to doubt
17 the validity of the certification provided pursuant to this section,
18 the employer may require, at the employer's expense, that the
19 employee obtain the opinion of a second health care provider,
20 designated or approved by the employer, concerning any
21 information certified under paragraph (1).

22 (B) The health care provider designated or approved under
23 subparagraph (A) shall not be employed on a regular basis by the
24 employer.

25 (C) In any case in which the second opinion described in
26 subparagraph (A) differs from the opinion in the original
27 certification, the employer may require, at the employer's expense,
28 that the employee obtain the opinion of a third health care provider,
29 designated or approved jointly by the employer and the employee,
30 concerning the information certified under paragraph (1).

31 (D) The opinion of the third health care provider concerning
32 the information certified under paragraph (1) shall be considered
33 to be final and shall be binding on the employer and the employee.

34 (4) As a condition of an employee's return from leave taken
35 because of the employee's own serious health condition, the
36 employer may have a uniformly applied practice or policy that
37 requires the employee to obtain certification from his or her health
38 care provider that the employee is able to resume work. Nothing
39 in this paragraph shall supersede a valid collective bargaining
40 agreement that governs the return to work of that employee.

(l) It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

(1) An individual's exercise of the right to family care and medical leave provided by subdivision (a).

(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

(m) This section shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until January 1, 1993, whichever occurs first.

(n) The amendments made to this section by Chapter 827 of the Statutes of 1993 shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until February 5, 1994, whichever occurs first.

(o) This section shall be construed as separate and distinct from Section 12945.

(p) Leave provided for pursuant to this section may be taken in one or more periods. The 12-month period during which 12 workweeks of leave may be taken under this section shall run concurrently with the 12-month period under the FMLA, and shall commence the date leave taken under the FMLA commences.

~~(q) In any case in which both parents entitled to leave under subdivision (a) are employed by the same employer, the employer shall not be required to grant leave in connection with the birth, adoption, or foster care of a child that would allow the parents family care and medical leave totaling more than the amount specified in subdivision (a).~~

~~(r)~~

(q) (1) Notwithstanding subdivision (a), an employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:

(A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.

(B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

1 (C) The employer notifies the employee of the intent to refuse
2 reinstatement at the time the employer determines the refusal is
3 necessary under subparagraph (B).

4 (2) In any case in which the leave has already commenced, the
5 employer shall give the employee a reasonable opportunity to
6 return to work following the notice prescribed by subparagraph
7 (C).

8 ~~(s)~~

9 (r) Leave taken by an employee pursuant to this section shall
10 run concurrently with leave taken pursuant to the FMLA, except
11 for any leave taken under the FMLA for disability on account of
12 pregnancy, childbirth, or related medical conditions. The aggregate
13 amount of leave taken under this section or the FMLA, or both,
14 except for leave taken for disability on account of pregnancy,
15 childbirth, or related medical conditions, shall not exceed 12
16 workweeks in a 12-month period. An employee is entitled to take,
17 in addition to the leave provided for under this section and the
18 FMLA, the leave provided for in Section 12945, if the employee
19 is otherwise qualified for that leave.

20 ~~(t)~~

21 (s) It ~~shall be~~ is an unlawful employment practice for an
22 employer to interfere with, restrain, or deny the exercise of, or the
23 attempt to exercise, any right provided under this section.